UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA : S1 12 Cr. 707 (LAK)

- v. - :

LIN WU, :
YING CHEN,
a/k/a "Jessica," :
ZE YU ZHU,
a/k/a "Jie Yu," :
BO QIN LIN,
a/k/a "Bei Jin," :
ZE GUANG ZHU,
a/k/a "Chu," :
FNU LNU,
a/k/a "Zhong," :
HONG FENG LIN,
a/k/a "Bus," :
a/k/a "Peter,"
JIN ZHENG, :
FNU LNU,
a/k/a "Mao Mao No. 1," :
YONG BIAO LI,
a/k/a "Elder Cousin," :
YU CHEN,
a/k/a "Cantonese Guy," :
WEN BIN WANG,
a/k/a "Commander," :
LE QING CHEN,
a/k/a "Yi Lok," :
XIN SHAN GUO,
WEN ZHU, :
CHIN SIONG FOH,
a/k/a "Mr. Zhou," :
a/k/a "Boss,"
SHAN FENG GAO, :
a/k/a "Zhu Pai,"
YOU LONG HOU,
a/k/a "Dai Mao," :

FNU LNU, :
a/k/a "Mandarin Guy,"
WEN ZHU,
a/k/a "Mao Mao No. 2," :
FNU LNU,
a/k/a "Ban Dian," :
a/k/a "Ming Hang Huang,"
YU LIN, :
a/k/a " Yu Zai,"
ZHEN QIANG WANG, :
a/k/a "Yi Qiang,"
JIN YUN CHEN, :
JIA LIN,
XIAO QIN FENG, :
YI LI,
GUO YANG, :
ZHU ZAI XIN,
LIN XIN HUI, and :
PING CHEN,
:
Defendants.
:
- -X

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PRETRIAL MOTIONS

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PRELIMINARY STATEMENT

The Government submits this memorandum in opposition to pretrial motions filed by defendants Yu Chen, a/k/a "Cantonese Guy," Jin Yun Chen, Ying Chen, a/k/a "Jessica," Bo Qin Lin, a/k/a "Bei Jin," Ze Guang Zhu, a/k/a "Chu," Yi Li, Xiao Qin Feng, and Lin Xin Hui.[1] One or more of the above defendants have moved for: (1) severance; (2) suppression of statements; and (3) production of various types of discovery. The Government addresses each motion below.

I. THE DEFENDANTS' SEVERANCE MOTIONS SHOULD BE DENIED

Of the 19 defendants remaining in this case, eight have moved for severances of different sorts. Specifically, the following defendants have made the following severance motions:

- Two defendants – Yu Chen, a/k/a "Cantonese Guy," and Jin Yun Chen – who are charged only in the narcotics conspiracy move to sever that count (Count Four).
- Three defendants – Ying Chen, a/k/a "Jessica," Bo Qin Lin, a/k/a "Bei Jin," Ze Guang Zhu, a/k/a "Chu," – who are charged only in the alien-smuggling offenses move to sever those counts (Counts One through Three).
- Three defendants – Yi Li, Xiao Qin Feng, and Lin Xin Hui – who are charged only in the Hobbs Act robbery counts move to sever those counts from the others and, presumably, from one another (Counts Five and Six).

As the Government wrote to the Court on March 1, 2013, in view of the number of defendants remaining, the Government is prepared to consent to a severance in this case. The Government proposed trying the alien-smuggling and narcotics offenses together in one trial (Counts One through Four, along with the access device fraud charged in Count Seven), and the various theft related offenses in two separate trials (one on Counts Five and Eight, and the other on Count Six). This proposal resolves the last group of severance motions described above.

At the pretrial conference on March 4, 2013, however, counsel for some of the defendants charged in either the alien-smuggling counts (One through Three) or the narcotics count (Count Four) objected to the Government's proposal to try those counts together. Severance is not appropriate, however, because there is an overlap in both participants and facts between the two groups of offenses and, as a result, there is a good deal of evidence that would necessarily be admitted in both trials, were they to be severed. For example, the confidential source ("CS") who participated in the alien-smuggling ventures was on several occasions partially paid in marijuana that was part of the charged narcotics conspiracy. Evidence of the narcotics conspiracy would therefore be an important part of the story of the alien smuggling offenses, and vice versa. As a result, severance is not warranted.

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[1] By letter dated March 6, 2013, Yong Biao Li, a/k/a "Elder Cousin," has withdrawn his motions.

A. Applicable Law

Any motion for severance is an uphill battle, for there is a strong policy in favor of joint trials. Joint trials of defendants indicted together "play a vital role in the criminal justice system" as they "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." *Richardson* v. *Marsh*, 481 U.S. 200, 209 (1987); *see Bruton* v. *United States*, 391 U.S. 123, 134 (1968). As the Supreme Court has explained:

> It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Marsh, 481 U.S. at 210; *see also United States* v. *Zafiro*, 945 F.2d 881, 886 (7th Cir. 1991)

(Posner, *J.*) (joint trials reduce not only litigation costs but also "error costs," that is the costs associated with depriving jury from making its determinations based on "the full picture"), *aff'd*, 506 U.S. 534 (1993).

The strong presumption is that defendants who are indicted together will be tried together. *See, e.g.*, *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993) ("[t]here is a preference in the federal system for joint trials of defendants who are indicted together"); *United States* v. *Blount*, 291 F.3d 201, 208-09 (2d Cir. 2002); *United States* v. *Henry*, 861 F. Supp. 1190, 1199 (S.D.N.Y. 1994); *United States* v. *Beech-Nut Nutrition Co.*, 659 F. Supp. 1487, 1498 (E.D.N.Y. 1987).

Defendants who nonetheless seek a severance have two options: arguing that the charges were not properly joined in a single indictment under Rule 8 of the Federal Rules of Criminal Procedure, or arguing that properly joined charges should be severed pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

1. Rule 8

Rule 8 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> **(a) Joinder of Offenses.** Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> **(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 8(a). The Second Circuit has interpreted Rule 8(a) to allow joinder of offenses where two or more criminal acts are "'unified by some substantial identity of facts or participants' or 'arise out of a common plan or scheme.'" *United States* v. *Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (quoting *United States* v. *Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)). "'Similar' charges include those that are 'somewhat alike,' or those 'having a general likeness to each other." *United States* v. *Rivera*, 546 F.3d 245, 253 (2d Cir. 2008). Multiple distinct counts "warrant joinder in a single trial" when they have "sufficient logical connection" to one another, *United States* v. *Ruiz*, 894 F.2d 501, 505 (2d Cir. 1990), or where "the same evidence may be used to prove each count." *United States* v. *Blakney*, 941 F.2d 114, 116 (2d Cir. 1991). Typically, joinder of counts at trial is appropriate where the evidence proving the counts is intertwined and overlapping. *See United States* v. *Amato*, 15 F.3d 230, 236 (2d Cir. 1994) (holding that it was appropriate to join a weapons possession count with RICO and murder counts because "the evidence offered to prove the gun count . . . was interconnected and overlapping with the evidence offered to prove" the other counts).

Joinder is also proper under Rule 8(a) "where evidence of one offense would be admissible in a separate trial on the other offense as evidence of 'other crimes, wrongs, or acts.'" *United States* v. *Halper*, 590 F.2d 422, 431 (2d Cir. 1978) (quoting Fed. R. Evid. 404(b)). This rule recognizes that, to whatever extent joinder of similar offenses may be inherently prejudicial, "the reality [is] that this element of prejudice is largely absent in situations where evidence of separate crimes would be admissible anyway." *Id.*

The test for "when offenses may be tried together reflects a policy determination that gains in trial efficiency outweigh the recognized prejudice that accrues to the accused." *United States* v. *Turoff*, 853 F.2d 1037, 1042 (2d Cir. 1988); *see also United States v. Werner*, 620 F.2d 922, 929 (2d Cir. 1980). "[T]here is a strong policy preference in favor of the joinder of qualifying charges and . . . the rule must be broadly construed toward that end." *United States* v.

Alexander, 135 F.3d 470, 476 (7th Cir. 1998).

Rule 8(b). In multi-defendant cases, Rule 8(b) applies to motions seeking to sever counts in which more than one defendant is named. *Turoff*, 853 F.2d 1037. In evaluating such a motion, Rule 8(b) is interpreted "[b]road[ly], . . . in the interests of more efficient administration of criminal trials." *Haggard* v. *United States*, 369 F.2d 968, 973 (8th Cir. 1966). Like Rule 8(a), the prerequisites for joinder under Rule 8(b) are satisfied so long as there is "some substantial identity of facts or participants" or crimes that "arise out of a common plan or scheme." *United States* v. *Cervone*, 907 F.2d 332, 341 (2d Cir. 1990). "Rule 8(b) does not require . . . that each defendant have participated in the same act or acts." *United States* v. *Krenning*, 93 F.3d 1257, 1266 (5th Cir. 1996); *see United States* v. *Teitler*, 802 F.2d 606, 615 (2d Cir. 1986) (participation in a series of transactions does not require participation in each transaction).

Crimes committed by different defendants that are interrelated or that flow from each other may properly be joined in a single indictment under Rule 8. For example, "tax counts can properly be joined with non-tax counts" where "funds derived from non-tax violations either are or produce the unreported income." *Turoff*, 853 F.2d at 1043. Thus, for example, two schemes are properly joined where one was committed to advance the other. *See United States* v. *Berger*, 22 F. Supp. 2d 145, 155 (S.D.N.Y. 1998) (tax fraud that facilitated government program fraud properly joined under Rule 8(b)).

Similarly, where the commission of one crime created the circumstances that made possible the commission of a subsequent crime, the two are sufficiently interrelated to satisfy the demands of Rule 8. *See, e.g.*, *United States* v. *Estrella*, No. S1 01 Cr. 984 (JFK), 2002 WL 655202, at *1 (S.D.N.Y. 2002) (illegal re-entry and narcotics offense committed after re-entry properly joined, since narcotics offense could not have been committed but for illegal re-entry);

United States v. *Gotti*, 42 F. Supp. 2d 252, 289 (S.D.N.Y. 1999) (proper to join count charging defendant with loaning money to narcotics traffickers to promote drug transaction with other counts charging subsequent extortion and robbery aimed at inducing repayment of loan).

So, too, crimes committed with a common purpose may be joined together. *See, e.g.*, *Attanasio*, 870 F.2d at 815 (two separate conspiracies to defraud United States properly joined, where both schemes "shared a common purpose: to conceal and launder [the loanshark's] income," and there was "an overlap of participants and acts"); *United States* v. *Reinhold*, 994 F. Supp. 194 (S.D.N.Y. 1998) (joinder proper under Rule 8(b) of various bankruptcy fraud and wire fraud schemes carried out by various combinations of defendants where each fraud had a common purpose, namely keeping one defendant's business afloat).

2. Rule 14

Rule 14 of the Federal Rules of Criminal Procedure permits severance of properly joined charges to avoid prejudice to a defendant or the Government. However, "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540. Rather, under the Supreme Court's decision in *Zafiro*, a severance should be granted "only if there is a serious risk that a joint trial would: [1] compromise a specific trial right of one of the defendants," 506 U.S. at 539, such as a right to cross-examine witnesses, *e.g.*, *Bruton*, 391 U.S. 123, or "[2] prevent the jury from making a reliable judgment about guilt or innocence," *Zafiro*, 506 U.S. at 539, as when, for example, the introduction of evidence admissible against only one defendant unduly prejudices another, or when joint trial deprives one co-defendant of exculpatory evidence that would otherwise be available. *United States v. Ferrarini*, 9 F. Supp. 2d 284, 289 (S.D.N.Y. 1998).

It is well settled that "differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *United States* v.

Carson, 702 F.2d 351, 366-67 (2d Cir. 1983); *see also United States* v. *Zackson*, 6 F.3d 911, 922 (2d Cir. 1993). Similarly, "[t]he fact that evidence may be admissible against one defendant but not against others does not require separate trials." *United States* v. *Rucker*, 586 F.2d 899, 902 (2d Cir. 1978); *see also Zackson*, 6 F.3d at 922; *Carson*, 702 F.2d at 367.

Even assuming that a particular defendant is somehow prejudiced by joinder — and particularly important here — the test under Rule 14 is whether that prejudice "is sufficiently severe to outweigh the judicial economy that would be realized by avoiding lengthy multiple trials." *United States* v. *Lanza*, 790 F.2d 1015, 1019 (2d Cir. 1986) (internal quotation marks omitted). This is because a joint trial "conserves judicial resources, alleviates the burden on citizens serving as jurors, and avoids the necessity of having witnesses reiterate testimony in a series of trials." *United States* v. *Lyles*, 593 F.2d 182, 191 (2d Cir. 1971) (internal quotation marks omitted).

A defendant seeking severance under Rule 14 thus bears the "extremely difficult burden" of showing that he or she would be so prejudiced by the joinder that he or she would be denied a constitutionally fair trial. *United States* v. *Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989), *abrogated in part on other grounds by United States* v. *Williams*, 504 U.S. 36, 55 (1992). Consequently, "[t]he principles that guide the district court's consideration of a motion for severance usually counsel denial." *United States* v. *Rosa*, 11 F.3d 315, 341 (2d Cir. 1993), *abrogated in part on other grounds by Crawford* v. *Washington*, 541 U.S. 36, 68 (2004).

The decision to grant a severance under Rule 14 is "confided to the sound discretion of the trial court," *United States* v. *Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003), and is "virtually unreviewable," *United States* v. *Stewart*, 433 F.3d 273, 314 (2d Cir. 2006).

B. Discussion

The Government's proposed plan for severance satisfies Rule 8 and Rule 14, and serves the interests of judicial economy and the "strong policy preference in favor of the joinder of qualifying charges." *Alexander*, 135 F.3d at 476. Trying the alien smuggling and narcotics offenses together[2] would result in substantial gains in efficiency and fairness, and would not result in improper joinder or prejudice.

1. The Drug and Alien Smuggling Charges are Properly Joined

The factual overlap between the drug and alien smuggling offenses satisfies Rule 8's standard for joinder. As noted above, the CS who participated in the alien smuggling activity was partially paid on several occasions in marijuana that was a part of the drug distribution conspiracy. As an initial matter, the fact that some of the contraband trafficked in the drug conspiracy was actually provided as consideration for overt acts in the alien smuggling conspiracy renders the two sets of crimes interrelated, as aspects of one "stemmed from" the other. *Gotti*, 42 F. Supp. 2d at 289; *see also United States* v. *Cole*, 857 F.2d 971, 973 (4th Cir. 1988) (where one defendant in drug conspiracy smuggled aliens into United States, and those aliens subsequently became workers for drug organization, joinder was proper), *United States* v. *Brown*, 744 F. Supp. 558, 563 (S.D.N.Y. 1990) (citing *Cole*); *cf. Turoff*, 853 F.2d at 1043

[2] As noted above, the Government's proposal to conduct separate trials for the robbery-related offenses (Counts Five and Eight in one trial, and Count Six in the other) resolves the severance motions made by the defendants in those counts. The Government's proposal to include the access device fraud charged in Count Seven in the trial of the alien smuggling and narcotics offenses charged in counts One through Four is not the subject of substantial dispute. The access device fraud conduct charged in Count Seven arose from the same confidential source relationship connected to the alien smuggling conduct charged in Counts One through Three, and the drug distribution conspiracy charged in Count Four. Evidence regarding the confidential source relationship, including regarding discussions at which both drug trafficking and access device fraud were discussed, would be admissible in trials of the access device fraud and also the drug and alien smuggling conspiracies. Additionally, the sole defendant in Count Seven, Hong Feng Lin a/k/a "Bus" a/k/a "Peter," is also a defendant in the narcotics count (Count Four) and two of the alien smuggling counts (Counts One and Two), and the access device fraud charge—alleging an approximately three-month period of possession of a single credit card skimming device used to facilitate fraudulent department store purchases—is unlikely by its nature to prejudice the defendants in the lengthy and extensive alleged drug and alien smuggling conspiracies.

(allowing joinder of tax and non-tax counts where "funds derived from non-tax violations either are or produce the unreported income"). Even beyond the logical interrelatedness between the charges, this factual overlap renders evidence establishing the alien smuggling conspiracy "interconnected and overlapping with" the evidence establishing the drug conspiracy. *See Amato*, 15 F.3d at 236. At trial of the alien smuggling conspiracy, evidence of these payments would be relevant and admissible to present the full factual context of the alien smuggling offenses and to establish the defendants' awareness of the illegality of their activity. And at trial of the drug conspiracy, evidence of the alien smuggling activity causing the payments would be relevant and admissible to explain the origin of the marijuana seized, which itself is part of the drug conspiracy and is relevant to the interpretation of coded remarks regarding drug trafficking recorded in intercepted wire communications. Accordingly, Rule 8(b)'s standards are satisfied.

The fact that not all of the defendants in the drug conspiracy may have known of or participated in the alien smuggling offenses does not render joinder improper. "A single conspiracy may encompass members who neither know one another's identities, nor specifically know of one another's involvement," *United States* v. *Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (citations omitted), and a defendant in a conspiracy need not know "all of the details of the conspiracy," *United States* v. *Labat*, 905 F.2d 18, 21 (2d Cir. 1990). The fact that some members of one or the other conspiracy may not have been aware of the transactions thus does not change the fact that members of the drug conspiracy provided marijuana to a confidential source in consideration for assistance in the very alien smuggling that was the object of the alien smuggling conspiracy.[3] Accordingly, joinder of the narcotics and alien smuggling counts is

[3] This direct relationship between the objects of the conspiracies—literally, some of the drugs trafficked in the drug trafficking conspiracy were provided as consideration for the smuggling of some of the aliens in the alien smuggling conspiracy—renders inapposite cases such as *United*

proper.

2. Severance of the Drug and Alien Smuggling Charges is Premature

The Government expects that the drug and alien smuggling counts will be able to be tried together efficiently and fairly and without causing undue prejudice. In light of the factual overlap between the drug and alien smuggling counts discussed above, the efficiency and fairness values underlying the general policy favoring joint trials would be advanced by allowing these offenses to be tried together. Severing these counts would not only prolong trial time by requiring duplicative presentation of evidence, it would also raise the risks of inconsistent verdicts, arbitrary advantage to the defendants tried separately, and raise the "error costs" associated with depriving the jury of the "full picture," *Zafiro*, 945 F.2d at 886.[4]

Although the defendants have suggested that they may suffer from the prejudicial effect of so-called "spillover" in the event of a joint trial, courts routinely have recognized that cautionary instructions reminding the jury to focus on defendants individually—instructions jurors are presumed to be able to follow—are sufficient to overcome the danger of prejudicial spillover. *Zackson*, 6 F.3d at 922; *United States* v. *Potamitis*, 739 F.2d 784, 790 (2d Cir. 1984); *United States* v. *Lasanta*, 978 F.2d 1300, 1307 (2d Cir. 1992) ("[t]he district court countered any possible spillover with specific instructions to the jury . . . that the jury should consider the

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States v. *Kouzmine*, 921 F. Supp. 1131 (S.D.N.Y. 1996), where charges related to one conspiracy could not be joined to charges based on a separate criminal venture undertaken by some members of the original conspiracy who "had a falling out with [a coconspirator] and went into business for themselves at another location," *id.* at 1133.

[4] At the March 4, 2013 conference, one defendant claimed that although marijuana was provided in partial payment for the smuggling of aliens, the alien smuggling counts should still be severed since the drug conspiracy focused not on marijuana but on ketamine. While it is true that, based on the evidence now available to the Government, the drug conspiracy involved a higher volume of ketamine than marijuana, this fact is of little relevance to the severance inquiry given that Count Four charges a single overarching conspiracy to distribute controlled substances and that defendants involved in ketamine distribution also discussed marijuana distribution on intercepted wire communications.

evidence separately against each defendant"), *abrogated in part on other grounds by Florida* v. *White*, 526 U.S. 559, 564 (1999).

The Government is mindful of the Second Circuit's warnings regarding the disadvantages of overly large or protracted trials in *United States* v. *Casamento*. 887 F.2d at 1151-52. Although there are currently 15 defendants charged in the drug and alien conspiracy counts who have not pled guilty, based on current discussions, the Government expects that the trial of these charges would involve 10 or fewer defendants. Should that expectation not be borne out, the Government may propose an alternative severance depending on which defendants remain in the case at that time.

Accordingly, severance of the drug and alien smuggling counts is premature. The Government expects that a joint trial of those counts would be of a manageable size and produce substantial benefits in efficiency and fairness without imposing any undue prejudice.

II. DEFENDANT YI LI'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENTS SHOULD BE DENIED

The Government respectfully submits that the motion of defendant Yi Li ("Li") to suppress statements made by Li following his arrest by Immigration and Customs Enforcement ("ICE") agents (collectively "the Agents") on September 19, 2012 be denied.

Li argues that his post-arrest statements should be suppressed because he claims that prior to being advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) – which Li acknowledges were provided to him – Li was informed of the nature of the charges against him, the potential sentence he faces, and that his cooperation with law enforcement would be beneficial. Affirmation of Edwin Ira Schulman ("Schulman Aff.") ¶ 10. Li claims that this "brief conversation" with the agents "served to nullify the significance" of the *Miranda* rights he was indisputably provided. *Id.* ¶ 11.

Because Li has failed to place any factual issue in dispute through an affidavit, his motion should be denied without a hearing. In the alternative, the Court should deny Li's motion to suppress his statements following a hearing because his statements were made knowingly and voluntarily in accordance with his Fifth Amendment right to remain silent.

Li is charged in Count Five of Superseding Indictment S1 12 Cr. 707 with conspiring to commit Hobbs Act robbery, in violation of Title 18, United States Code, Section 1951. Li was arrested in Yonkers, New York on September 19, 2012. *See* Schulman Aff., ¶ 7-8. After his arrest, Li was transported to 26 Federal Plaza in Manhattan. *Id.* ¶ 9. Li was advised of his *Miranda* rights, orally and in writing, in Fuzhou. *Id.* Li was provided with the advice of rights form in Chinese which he signed. *Id.* ¶ 10.

Later that day, Li was delivered to the United States District Court in New York, New York and was presented and arraigned before the Magistrate Judge on duty that afternoon.

1. Because Yi Li Failed To Create an Issue of Fact, Li's Motion to Suppress Should Be Denied Without a Hearing

Li has failed to submit an affidavit creating an issue of material fact; thus his motion should be dismissed without a hearing.

A. Applicable Law

A defendant seeking the suppression of evidence is not automatically entitled to an evidentiary hearing on his claim, but must first "state sufficient facts which, if proven, would [require] the granting of the relief requested." *United States* v. *Kornblau*, 586 F. Supp. 614, 621 (S.D.N.Y. 1984) (internal quotation and citation omitted); *see United States* v. *Mathurin*, 148 F.3d 68, 69 (2d Cir. 1998); *United States* v. *Ortiz*, No. 99 Cr. 532 (DC), 1999 WL 1095592, at *1 (S.D.N.Y. Dec. 3, 1999). To meet this burden, a defendant must present his claim through an affidavit of an individual with personal knowledge of the relevant facts. *See United States* v.

Gillette, 383 F.2d 843, 848-49 (2d Cir. 1967); *United States* v. *Viscioso*, 711 F. Supp. 740, 745 (S.D.N.Y. 1989). In such an affidavit, the defendant must show "that disputed issues of material fact exist before an evidentiary hearing is required." *Viscioso*, 711 F. Supp. at 745 (internal quotation marks omitted). An evidentiary hearing on a motion to suppress is required only if "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact" are in question. *United States* v. *Pena*, 961 F.2d 333, 339 (2d Cir. 1992) (internal quotation marks omitted).

Moreover, statements offered by an attorney do not create an issue of fact. *See Gillette*, 383 F.2d at 848 (holding that statement submitted by attorney did not raise a factual issue where it did not allege personal knowledge on the part of the attorney); *Lipton* v. *Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) ("Mere conclusory allegations or denials in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist." (internal quotation and citations omitted)); *United States* v. *Mottley*, 130 F. App'x 508, 510 (2d Cir. 2005) (summary order) ("The statements offered on the matter by Mottley's attorney in the reply brief before the district court likewise did not create an issue of fact.").

B. Discussion

Li has not filed the requisite affidavit necessary to create an issue of fact. Instead, defense counsel has submitted an affidavit containing representations of facts and arguments. Li's attorney's affidavit is necessarily not based on personal knowledge because his attorney was not present during Li's post-arrest statements. The affidavit thus does not trigger the right to a hearing under the law of this Circuit.

Moreover, with respect to his post-arrest statements, the Schulman affidavit presents facts supporting that Li's statements were made knowingly and voluntarily. Prior to providing post-arrest statements, Li executed a detailed written waiver of rights that advised him in Fuzhou of his rights. Even assuming the truth of the allegations regarding the conversation that took place prior to the rights being administered, those allegations have not been properly sworn to by Li and as set forth below would not warrant suppression. Because Li has failed to create an issue of fact, he is not entitled to a hearing on his suppression claims and his suppression motion should be denied on the papers.

2. Li's Waiver of his *Miranda* Rights Was Knowing and Voluntary

Should the Court order a hearing on Li's defective motion to suppress his post-arrest statements, Li's motion should be denied after such a hearing based on the evidence the Government expects would be adduced.

A. Applicable Law

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Supreme Court determined that prior to interrogating an in-custody suspect, the Government must inform him of the Government's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to have counsel present if he so desires. *Id.* at 468-70. Having been advised of his *Miranda* rights, a suspect may, of course, waive his *Miranda* rights and agree to be interviewed. *Miranda*, 384 U.S. at 444. A waiver of *Miranda* rights is valid if it is the product of a knowing and voluntary choice, *i.e.*, if the defendant understood his or her rights and chooses to relinquish them without governmental coercion. *Colorado* v. *Spring*, 479 U.S. 564, 572-75 (1987); *Colorado* v. *Connelly*, 479 U.S. 157, 169-70 (1986). Such a waiver can be express or implied. "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2262 (June 1, 2010).

It is the Government's burden to establish by a preponderance of the evidence that a defendant's relinquishment of *Miranda* rights was voluntary, and made with a full awareness of the right being waived and the consequences of waiver. *Connelly*, 479 U.S. at 168. A court may properly conclude that *Miranda* rights have been validly waived "if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (internal quotation marks and citation omitted); *see also United States* v. *Bye*, 919 F.2d 6, 8-9 (2d Cir. 1990) (test is whether waiver was "product of an essentially free and unconstrained choice," and reviewing court must consider totality of the surrounding circumstances).

Under *Miranda* and its progeny, law enforcement agents are free to tell a defendant about the evidence against him, the charges, and the potential punishment he may face to encourage him to cooperate with the Government. *See United States* v. *Awan*, 384 F. App'x 9, 15 n.2 (2d Cir. 2010) (unpublished disposition) ("[W]e have 'held that law enforcement agents [are] free to discuss with [a defendant] the evidence against him and the reasons why he should cooperate.'" (quoting *United States* v. *Bye*, 919 F.2d at 9 (internal quotation marks omitted))); *see also United States* v. *Berkovich*, 932 F. Supp. 582, 587 (S.D.N.Y. 1996) ("Law enforcement agents may tell the defendant about the evidence against him as well as the reasons why he should cooperate"). To that end, "truthfully informing suspect of the evidence against him and the legal consequences should he fail to cooperate "may have presented [the defendant] with a difficult and unpleasant decision" but was not coercive. *United States* v. *Major*, 912 F. Supp. 90, 95 (S.D.N.Y. 1996).

B. Discussion

Here, the Government expects that the evidence elicited at a hearing will establish that Li was advised of and knowingly and voluntarily waived his *Miranda* rights. Li reviewed and signed a *Miranda* waiver form that set forth his rights in Chinese. This form was also read to him in Fuzhou, by an interpreter. Further, the Government expects the evidence would show that Li was in no way coerced into making a statement. Advising Li of the charges against him and the potential benefits to cooperating in no way rendered his waiver involuntary.

III. THE GOVERNMENT CONSENTS TO AN EVIDENTIARY HEARING REGARDING THE MOTION TO SUPPRESS STATEMENTS FILED BY DEFENDANT JIN YUN CHEN

Defendant Jin Yun Chen ("Chen") has filed a motion to suppress statements she made to law enforcement officers on September 20, 2012, the date of her arrest. The motion was accompanied by a sworn affidavit of the defendant. The Government agrees that the affidavit of the defendant raises a material issue of fact with respect to the constitutionality of the admission of the statements obtained from the defendant. As a result, the Government hereby consents to an evidentiary hearing in this matter, limited to the following issues: (1) whether the defendant was advised of her rights under *Miranda*, prior to the time at which she made statements to law enforcement officers on the day of her arrest; and (2) whether the waiver of the defendant's rights pursuant to *Miranda* was made knowingly and voluntarily.

The Government is prepared to brief the applicable legal principles that govern resolution of this matter in a post-hearing brief, or if the Court wishes, at any earlier point.

IV. DEFENDANTS' DISCOVERY MOTIONS SHOULD BE DENIED

Defendant Ze Guang Zhu has filed several discovery-related motions, all of which should be denied because they seek material to which Zhu is not entitled at this time. Specifically, defendant Zhu moves for orders for (1) a bill of particulars, designating the "intercepted telephone conversations and recordings," as well as the "surveillance videos and still photographs" that the Government intends to use at trial against Zhu; (2) disclosure of 404(b) evidence and (3) disclosure of *Brady* material. Defendant Ying Chen joins Zhu's motions for a bill of particulars and for disclosure of 404(b) evidence.[5]

All of Zhu's discovery motions should be denied. Each of the discovery motions lacks merit – as discussed herein in greater detail – and all of the discovery motions suffer a common deficiency: Zhu failed to comply with Local Criminal Rule 16.1, which provides that "[n]o motion addressed to a bill of particulars or answers or to discovery and inspection shall be heard unless counsel for the moving party files with the court simultaneously with the filing of the moving papers an affidavit certifying that said counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issued raised by the motion without the intervention of the court and has been unable reach such an agreement." In this case, Zhu has not filed the required Rule 16.1 statement nor could he, because Zhu did not in fact provide prior notice of or seek to confer with the Government in advance of any discovery or particulars motion. Indeed, before these motions were filed the Government had been unaware of any outstanding discovery issues and at no point before had Zhu stated in Court or communications with the Government that there were open issues relating to discovery. The purpose of Rule 16.1 is to avoid precisely this scenario, and to require parties to negotiate legitimate discovery issues in good faith rather than simply filing stock motions without notice that waste the time of the parties and the Court. Accordingly, Zhu's motions can be denied on

[5] Defendant Jin Yun Chen filed, on January 24, 2013, a discovery request letter that asked the Government to produce (1) oral statements made by defendant Chen during conversations with Government agents or informers, or in response to interrogation by a person known to the Chen as a government agent; (2) any waiver of rights form signed by Chen or read by law enforcement to Chen; (3) any materials obtained from defendant Chen, or any co-defendant, or co-conspirator, which the government intends to utilize as evidence at trial, particularly any materials seized from 846 57th Street, Brooklyn, New York, on September 20, 2012; and (4) materials listed with the Bates numbers 1775-1853 in the government's December 5, 2012 discovery index. The Government has responded to Chen's discovery requests and provided the requested materials in its possession, and advised counsel of outstanding items. To the extent that Chen's request letter is construed as a motion for an order compelling the production of the requested material, that motion should be denied as moot.

the basis that they failed to comply with Rule 16.1 alone. *See United States* v. *Ahmad*, 992 F. Supp. 682, 684 (S.D.N.Y.1998). In any event, as described below, the motions lack merit.

1. Defendants Are Not Entitled To A Bill Of Particulars

Defendant Zhu, joined by Ying Chen, seeks a bill of particulars identifying (1) the intercepted telephone conversations and recordings the Government intends to use at trial against Zhu and (2) the surveillance videos and photographs the Government intends to use at trial against Zhu.[6] Here, Zhu is not seeking further clarification of the nature of the charges against him – the proper function of a bill of particulars. Instead, Zhu seeks to use the mechanism of a bill of particulars in an effort to obtain early disclosure of the Government's trial exhibits. Because a bill of particulars is not an investigative or discovery tool for the defense, the request for particulars should be denied. Similarly, even if the request for particulars is restyled as a motion for early disclosure of the Government's trial exhibits, that request should also be denied.

Rule 7(f) of the Federal Rules of Criminal Procedure permits a defendant to seek a bill of particulars where necessary to "prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States* v. *Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987). A bill of particulars, however, is not a discovery device and "should not function to disclose evidence, witnesses, and legal theories to be offered by the Government at trial or as a general investigative tool for the defense." *Henry*, 861 F. Supp. at 1197; *see generally United States* v. *Bellomo*, 263 F. Supp. 2d 561, 580 (S.D.N.Y. 2003) ("A bill of particulars is not designed to: obtain the government's evidence; restrict the government's evidence prior to trial; assist the defendant's investigation; obtain the precise way in which the government intends to prove its case; interpret evidence for the defendant, or

[6] Zhu's notice of motion does not request a bill of particulars identifying the video and photographic evidence the Government intends to use at trial against Mr. Zhu. However, his memorandum of law does seek this form of relief.

disclose its legal theory."). Accordingly, a bill of particulars "is required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *United States* v. *Chen*, 378 F.3d 151, 163 (2d Cir. 2008) (internal quotation marks omitted).

Here, although the Indictment is not a "speaking" Indictment, it, along with the discovery provided in this matter, sufficiently advises Zhu and the other defendants of the charges pending against them. In the case of Zhu, the Indictment charges Zhu with participation in a conspiracy to, for purposes of commercial advantage and private financial gain, bring aliens to United States who had not received proper authorization to enter or reside in the United States, as well as two substantive counts of alien smuggling. Count One of the Indictment – the alien smuggling conspiracy count – includes overt acts, which provide two specific examples of actions allegedly taken by defendant Zhu in connection with the conspiracy. The Government has also telephonically identified for Zhu's defense counsel the dates on which it alleges Zhu provided passports (or had someone provide passports on his behalf) to the confidential source assisting the Government with its investigation so that the individuals whose passports were provided could be smuggled into the United States. The Government has also identified for Zhu's counsel the number of passports that it alleges were provided to the confidential source by Zhu or on Zhu's behalf on each occasion. In light of this disclosure by the Government, there can be no question that Zhu has been "advised of the specific acts of which he is accused." *Chen*, 378 F.3d at 163 (internal quotation marks omitted). As a result, a bill of particulars is unwarranted here.

Complaining that the Government has left the defense to "sift through the data without guidance as to which parts the government intends to offer," Zhu seeks a bill of particulars in order to obtain early identification of the Government's specific trial evidence. However, the "mere existence of a 'mountain of documents' does not entitle" Zhu to a bill of particulars. *United States* v. *Mandell*, 710 F. Supp. 2d 368, 385 (S.D.N.Y. 2010). When the defendant has been fully apprised of the nature of the charges against him, "the amount of discovery is of little import" to the determination of whether a bill of particulars is necessary. *Id.*

Defendants' reliance on the holding in *Bortnovsky* is misplaced and indeed instructive. In a three-page per curiam opinion, the *Bortnovsky* panel found that a retrial was warranted due to the failure to order a bill of particulars because efforts by the government to "proceed furtively" resulted in a shift of the burden to defendants to prove their innocence at trial. 820 F.2d at 575. The Court noted that, on charges of insurance fraud, the Government submitted evidence to the jury about twelve separate burglaries, although only four were alleged to be fabricated, essentially requiring the defendants to introduce evidence that the remaining eight actually occurred. Defendants were not told even the dates of the burglaries among the twelve that the government alleged underlay the fraud. Moreover, "the relevance of key events [to the charges in the indictment] was shrouded in mystery at the commencement of and throughout the trial." *Id.*

The facts of *Bortnovsky* bear no relationship to the facts here. It is ludicrous to suggest that the Indictment and discovery in this case represent a decision by the Government to "proceed furtively," or that it is reasonable to conclude that defendants are so lacking in necessary information that the burden of proof has been shifted to them to prove their innocence or that "the relevance of key events [to the charges is] shrouded in mystery." *Id.* Here, the defendants have overt acts specified in the indictment; all of the Government's Rule 16 materials; and substantial information from the Government through telephonic conversations as to the Government's theories and evidence. *See United States* v. *Ferguson*, 478 F. Supp. 2d

220, 227 (D. Conn. 2007) ("Just as the government cannot merely produce unlimited documents in lieu of providing sufficient detail as to the charges, the defendants cannot 'use the vastness or complexity of the alleged conspiracy and its attendant documentary evidence as a sword against the government when the Indictment, discovery, and other information provided by the government adequately notify the Defendants of the charges against them.'" (quoting *United States* v. *Rigas*, 258 F. Supp. 2d 299, 305 (S.D.N.Y. 2003))). There is no mystery about the charges in this case, and the defendants have more than adequate information to prepare their defenses and avoid unfair surprise at trial. Accordingly, the motion for particulars should be denied.

Zhu's motion could, alternatively, be restyled by the Court as a request for early disclosure of the Government's trial exhibit list. There is no requirement in the Federal Rules of Criminal Procedure that the Government identify in advance those discovery materials that it intends to use in its case-in-chief. *United States* v. *Nachamie*, 91 F. Supp. 2d 565, 570 (S.D.N.Y. 2000). However, the Court has discretion to order early disclosure of the Government's exhibit list in order to facilitate trial preparation. *United States* v. *Falkowitz*, 214 F. Supp. 2d 365, 392-93 (S.D.N.Y. 2002). In this case, as a practical matter, the defendants will have advance notice as to any recordings that the Government may use in its case-in-chief. Because all of the recordings in this case are, at least in part, in a foreign language, the Government will need to prepare, and provide defense counsel in advance of trial, official transcripts of each of the recordings that it intends to offer at trial. While the Government may not choose to offer at trial all of the recordings for which it prepares an official transcript, it will not offer any recordings for which there is not an official transcript prepared.[7] In sum, defendants will have advance

[7] To the extent that the Government identifies any English-language recordings that it intends to offer at trial and for which no transcript would be prepared, the Government will specifically identify these

notice of the subset of the recordings produced in discovery which the Government may use in its case-in-chief, and there is no need for the Court to formally order early disclosure of those recordings. Similarly, because the Government has identified for Zhu the dates on which he is alleged to have committed acts in furtherance of the conspiracy, thus allowing defense counsel to focus on the surveillance video and photographs for those dates, there is no need for a formal order directing the Government to specifically identify the video and photographs it intends to offer at trial in order to facilitate trial preparation. As a result, even if Zhu's motion were restyled as a motion for early disclosure of the Government's exhibit list, that motion should be denied.

2. Zhu's Motion for *Brady* Information Should Be Denied

Zhu moves for a generic order for the production of *Brady* information. The Government, however, is fully aware of its *Brady* obligations, has met them, and will continue to meet them. *See United States* v. *Coppa*, 267 F.3d 132, 139-44 (2d Cir. 2001) (describing Government's obligations). The law is clear that, in such cases, motions seeking to compel the Government to do what it has represented it will do should be denied. *See United States* v. *Nunez*, No. 00 Cr. 121 (RCC), 2001 WL 91708, at *7 (S.D.N.Y. Feb. 1, 2001) ("In light of the Government's good faith representations, there is no present need to direct the Government to comply with their discovery obligations pursuant to *Brady*.").

3. **Zhu's Motion for 404(b) Notice Should Be Denied**

Zhu, joined by Ying Chen, moves for an order requiring the Government to provide advance notice of any Rule 404(b) evidence. The Government will provide such advance notice, as is required by Rule 404(b), and will do so, to the extent then known, so that Rule 404(b) issues can be raised in accordance with the Court's practice regarding the filing of *in limine* motions,

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recordings to defense counsel in advance of trial.

which requires motions *in limine* to be filed no later than ten days prior to the scheduled commencement of trial. If other crimes evidence is discovered or becomes relevant after that point, or during the trial, the Government will bring such evidence to the immediate attention of the defense and the Court. *See United States* v. *Castro*, No. 94 Cr. 809 (JFK), 1995 WL 6235, at *3 (S.D.N.Y. Jan. 6, 1995).

CONCLUSION

Based on the foregoing authority, the Government submits (1) that the defendants' motion for severance be denied; (2) that defendant Li's motion to suppress should be denied without a hearing; (3) that a hearing on the issues raised by defendant Chen be scheduled; and (4) that defendants' discovery motions be denied.

Dated: New York, New York
March 7, 2013

Respectfully submitted,

PREET BHARARA
United States Attorney
for the Southern District of New York

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CERTIFICATE OF SERVICE

PAUL M. MONTELEONI deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on March 7, 2013, he caused a copy of the attached Government's Memorandum of Law in Opposition to Defendants' Pretrial Motions be sent to all counsel of record via the Court's ECF system.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

/s/ Paul M. Monteleoni
Paul M. Monteleoni

Executed on: March 7, 2013
New York, New York